93-749

Supreme Court, U.S.
FILED
SEP 24 1993
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No.

In the Supreme Court of the United States

Term, 199

PAUL A. KELLY and PAMELA E. KELLY,

Petitioners

vs.

PAUL A. OBER, CHARLES M. WATKINS, ANNA MIHELC and PAULINE MIHELC,

Respondents

Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the judicial pleading (absolute) privilege with respect to defamation of character violate the Equal Protection and Due Process provisions of the United States Constitution?

Suggested response: Yes.

2. Will this Honorable Court recognize that one's reputation is not only a property right, but one of a person's most important property rights entitled to equal protection and due process protection?

Suggested response: Yes.

3. Is justice served by allowing Plaintiffs' attorneys, as opposed to judges and defense counsel, absolute privilege in their actions in civil proceedings?

Suggested response: No.

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PETITION FOR WRIT OF CERTIORARI

NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 199

PAUL A. KELLY and PAMELA E. KELLY

Petitioners

V.

PAUL A. OBER, CHARLES M. WATKINS
ANNA MIHELC AND PAULINE MIHELC

Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul A. Kelly and Pamela E. Kelly, the Petitioners herein, pray that a Writ of Certiorari issue to review the Order of the Supreme Court of the Commonwealth of Pennsylvania entered in the above-captioned case on August 18, 1993, and to the Judgment of the Superior Court of Pennsylvania dated June 18, 1992.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Order of the Supreme Court of Pennsylvania, unreported at 278 M.D. Allocatur Docket, 1992, is printed in Appendix A attached hereto, at page 16. The Judgment and Opinion of the Superior Court of Pennsylvania is printed in Appendix B attached hereto at page 17. The Opinion and Order of the Court of Common Pleas of Susquehanna County, Pennsylvania, is printed in Appendix C attached hereto at page 33.

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania (Appendix A, page 16) was entered on August 18, 1993. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1257.

DECISIONS INVOLVED

This case involves judicial Decisions of the Supreme Court of the United States, *Abbott v. National Bank of Commerce,* 175 U.S. 409, 414, 20 S.Ct. 153, 155, 44 L.Ed. 217, 219 (1899); together with the following Decisions of the Supreme Court of Pennsylvania followed by the Superior Court of Pennsylvania, to wit: *Greenberg v. Aetna Insurance Company,* 427 Pa. 511, 235 A.2d 576 (1967), *cert. den. sub nom., Scarletti v. Aetna Casualty and Surety Co.,* 392 U.S. 907, 88 S.Ct. 2063, 20 L.Ed. 2d 1366 (1968); *Post v. Mendel,* 510 Pa. 213, 221, 507 A.2d 351, 355 (1986); *Pawlowski v. Smorto,* 403 Pa. Superior Ct. 71, 81, 588 A.2d 36, 41 (1991).

STATEMENT OF THE CASE

On March 14, 1990, Respondents Ober, an Attorney at Law, et al., with no prior notice, and with no communications of any nature with Petitioners Kelly, filed the most impertinent, outrageous, scandalous and defamatory Complaint ever placed on record in sparsely populated Susquehanna County against Paul A. Kelly, Attorney at Law, and his wife Pamela E. Kelly.

Thereafter, Petitioners Kelly filed the Complaint in the above-captioned matter against the various Respondents, Ober et al., seeking the recovery of compensatory and punitive damages on numerous causes of action including Defamation of Character.

The actions of the Respondents Ober et al. constituting the elements of this cause of actions related, substantially, to the prior publication of the aforesaid defamatory Complaint filed by Respondents Ober et al. against the Petitioners Kelly in the Court of Common Pleas of Susquehanna County, Pennsylvania, at the Court House, Montrose, Pennsylvania, where both Petitioners Kelly live and where Paul A. Kelly, an Attorney at Law, practices law as a profession and livelihood.

The defamatory allegations in the Complaint filed in the present matter are easily summarized herein.

Older Adults Protective Service Act

In the publication involved in the above matter (a Complaint filed in the Court of Common Pleas of Susquehanna County), Respondents, Ober et al. alleged, in six separate

paragraphs, that the Petitioners Kelly have *violated* the provisions of a Pennsylvania statute known as the "Older Adults Protective Service Act" (35 P.S. 10211 *et seq.*). It is respectfully submitted that any person reading this language would, of clear necessity, come to the immediate conclusion that there exists some competent evidence that, in some manner, the Petitioners Kelly have violated a statute of the Commonwealth of Pennsylvania which was, obviously, intended to provide protective services for older (and presumably less than astute) adults.

However, a reading of the "Older Adults Protective Service Act" will clearly demonstrate that there is absolutely no manner in which this statute can or ever could have been violated by Paul A. Kelly or Pamela E. Kelly. The statute is, rather, a legislative enactment *empowering and even directing* an Agency for the Aging to intercede in matters where there is some concern that some older adult citizen is in need of some type of protective service. Simply stated, the Act was never intended or written in a manner so that any person in the position of Petitioners Kelly could, intentionally, maliciously or otherwise, violate the statute. If there is anyone who could possibly violate said statute, it would be an employee of the government who failed to investigate an allegation of some type of abuse that was made to the agency. [In this case, interestingly enough, there was not even a report to any agency that any abuse had ever taken place by either Paul A. Kelly or Pamela E. Kelly.]

On the basis of the foregoing, it is respectfully submitted that the Respondents, Ober et al. in the above-captioned matter have defamed Paul A. Kelly and Pamela E. Kelly by alleging that they violated this "Older Adults Protective Service Act" when it was well known to all—especially Defendant,

Ober, who was and is an Attorney at Law—that these allegations were completely and, by very definition, false and incapable of being proven at the time of trial.

Nevertheless, for what the Petitioners Kelly allege to be for purely defamatory reasons, said allegations were introduced into the Complaint filed against the Petitioners Kelly herein. As such, it is respectfully submitted that no Defendant is entitled to any immunity privilege for having made such defamatory statements in the publication giving rise to the above matter.

Forgery

Another defamatory allegation made by Respondents, Ober et al. against the Plaintiff, Paul A. Kelly, in the course of the judicial pleading (Complaint) was that he "forged" the signature of Pamela E. Kelly. It is well known that a forgery is a crime in the Commonwealth of Pennsylvania in accordance with 18 Pa. C.S.A. Section 4101. As such, by using this language Ober et al. accused Attorney Paul A. Kelly of committing a violation of the Criminal Code of the Commonwealth of Pennsylvania. More particularly, by alleging a forgery, the Respondents, Ober et al. have made an allegation that "strikes to the very heart" of the profession of Plaintiff, Paul A. Kelly, as an Attorney at Law.

It is, of course, reprehensible and criminal for one person to forge the signature of another. However, if an aggravation of such a crime is possible, it would be by an Attorney at Law forging the signature of another person in order to "complete" a real estate transaction. As such, it is respectfully submitted that the allegation that Attorney Paul A. Kelly committed the

crime of forgery, is an outrageous aggravation to an ordinarily defamatory statement.

Now, as is well known, the essence of a forgery is the unauthorized placing of another's signature for "any purpose". In this case, it is crystal clear to anyone who knows the parties, Paul A. Kelly and Pamela E. Kelly that, in no manner, whatever, did Paul A. Kelly ever write on any document the signature of Pamela E. Kelly as it appears on any document relevant to the above matter, for any purpose whatever. Moreover, it is even more abundantly clear that, even if he did, the placement of the signature of Pamela E. Kelly would have been completely approved and authorized.

Especially, there was not even a scintilla of evidence from which it could possibly have even been suspected that the placement of the name "Pamela E. Kelly" was UNAUTHORIZED—the essential element of forgery. Totally lacking is even the remotest possibility that the publishers of the defamatory Complaint ever had any ability or intention whatever, of ever proving any lack of authorization (even if the signature were not the genuine signature of Pamela E. Kelly). In fact, the same Complaint alleges that, at all times relevant, Paul A. Kelly was acting as an agent for Pamela E. Kelly.

Nevertheless, with total lack of any probable cause, reasonable basis, unreasonable basis or suspicion, or anything other than a totally defamatory intent, the Respondents, Ober et al. did allege that Paul A. Kelly had forged the signature of his wife, Pamela.

It is respectfully submitted that this allegation is not only totally wrong, it is so completely devoid of any possibility of proof as to clearly demonstrate that the only reason for making the allegation is the exact defamatory intent alleged in the Complaint filed in the above matter.

Respondents, Ober et al. (Defendants below) filed Preliminary Objections (Appendix 2) to the Complaint filed by Petitioners Kelly against Respondents, Ober et al., in the Court of Common Pleas of Susquehanna County. That Court rendered an Opinion sustaining all of the Preliminary Objections and dismissing the suit, which Decision was affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania through denial of the Petition for Permission to Appeal (all of which are attached hereto as Appendices).

REASONS FOR ALLOWANCE OF THE WRIT

It is time that this Honorable Court review the concept of the *absolute privilege* afforded to attorneys in judicial pleadings, as recognized by currently prevailing Decisions of the Pennsylvania Supreme Court such as *Greenberg v. Aetna Insurance Company,* 427 Pa 511, 235 A.2d 576 (1967), *cert. den. sub nom., Scarletti v. Aetna Casualty and Surety Co.* 392 U.S. 907, 88 S.Ct. 2063, 20 L.Ed. 2d 1366 (1968); *Post v. Mendel,* 510 Pa. 213, 221, 507 A.2d 351, 355 (1986); *Pawlowski v. Smorto,* 403 Pa. Superior Ct. 71, 81, 588 A.2d 36, 41 (1991), and determine that such privilege should be abolished or strictly limited.

It is time that this Honorable Court reconsider its nearly century old Decision rendered in 1899: *Abbott v. National Bank of Commerce,* 175 U.S. 409, 414, 20 S.Ct. 153, 155, 44 L.Ed. 217, 219 (1899) which refused to recognize that defamation in pleadings could constitute a United States constitutional question in light of the realities of the twentieth century.

Indeed, many of the current "hornbook" legal principles of this Honorable Court rendered in the most recent forty years are the result of reconsideration of previously accepted judicial concepts which, while appearing to be judicially sound, proved unsuitable in light of the historical development of this nation. See, for the easiest example, *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) which was decided only three years earlier than the *Abbott* Decision (and most likely by the same Court members). Forty six years (of "separate but equal") later, this Court decided that enough was enough and rendered *Brown v. Board of Education of Topeka, Kansas,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

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Reasons for Allowance of the Writ

Defamation is defamation is defamation, and it remains so regardless of the manner of the publication thereof, or the fact that it is given a number and term in the clerk's office of a Court of Common Pleas as opposed to being written or spoken in a less formal forum or format. It is and remains so whether the offending person is a dredge of society or a "distinguished practitioner" licensed to practice law.

"Ordinary citizens" when charged with defamation, have to defend such suits through use of the "ordinary defenses" such as truth of the publication, lack of malicious intent, etc. The law does not and should not recognize or create a special class of persons who are treated otherwise or a special forum where different rules apply.

To say that one may be held legally accountable for "street" defamations, which are probably ignored by most who hear them, but given privilege and immunity from defamatory remarks *filed (published) in Court, under oath,* does not make sense.

If the above cited cases represent the "correct" law under what they argue to be the present system, then I, as an attorney, can reach down into the quagmire pits of drug crazed humanity and "possibly" find some person to tell me that your spouse has given him/her AIDS. Am I, an attorney, under *any* legal obligation to perform even the most basic type of investigation before instituting a trespass action against your poor innocent partner? Do I have to at least have this liar tested to even confirm that he/she is infected with the HIV virus? No! I do not! I do not even have to serve your loved one with a Summons and demand interrogatories, or set up a deposition to obtain some sworn evidence before setting my course for your family's irreparable destruction.

I can race to my office, file a detailed Complaint (couched in the most disgusting terms) in the public court house of your home county where your daily peers are sure to see it, tip off the *Philadelphia Inquirer* and the *Centre County News* (where you may have gone to college), ruin your relatives' reputation forever and *walk away scot-free*.

I, as an attorney, escape behind the curtain of *immunity and privilege* because I tested well in school and was able to pass the Pennsylvania Bar Exam. Through some unconscionable metamorphosis my baccalaureate gown transformed itself in real life into a cape more powerful than the dreaded Count Dracula's. I am free to slip back into the night to await the blood of another victim—all because I am "smart enough" to pay the filing fee and publish defamation in Court where it is "safe".

Can this be right? No, it never was and never will be; however, it will take a Court with the willingness to cast a ray of light into the darkness to put an end to this time "honored" error.

Defamation was never intended to be protected by the Constitution of the United States; in fact, the opposite is true.

Article V of the Bill of Rights, passed on December 15th, 1791 (5th Amendment) states: "... nor be deprived of life, liberty, or *property* without due process of law ...".

Section 1 of the Fourteenth Amendment to the United States Constitution states: "... nor shall any state deprive any person of life, liberty, or *property,* without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the Commonwealth of Pennsylvania is even more specific in Article I of the Declaration of Rights.

Section 1. Inherent rights of mankind:

> "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and *defending* life and liberty, of acquiring, possessing *and protecting* property and *reputation*, and pursuing their own happiness." (Emphasis added.)

Section 11. Courts to be open; suits against the Commonwealth:

> "All courts shall be open; and every man for an injury done him in his lands, goods, person or *reputation* shall have remedy by due course of law ...". (Emphasis added.)

Are my clients not deprived of property (their very reputations) without due process if attorneys Ober and Watkins are immune from suit or granted immunity in this matter?

Are my clients not persons? Where is the due process and equal protection if Mr. Ober and/or Watkins are immune from suit or cloaked with privilege to act without being responsible for such actions?

The framers of both Constitutions wrote in plain English. Due Process, Equal Protection and the Inherent Rights of Mankind mean just what they say; no more, no less.

Petitioner hastens to add that the abolition of the absolute "privilege" to commit defamation in pleadings provided to attorneys need not jeopardize the privilege currently provided to members of the judiciary, nor does this Petition seek such abolition. A valid distinction exists in the fact that members of the judiciary are either elected or appointed to positions of responsibility which provides either an independent justification for the privilege, or, at the very least, such distinction as

to make it clear that the privilege afforded to the judiciary (as opposed to litigants) is not one of the subjects of this Petition.

Nor is there any modern necessity of allowing defamation as part of a Complaint. It is usually the response of those who wish to use and to continue to use pleadings for defamatory purposes that the Courts must remain open to all—the right and the wrong; the solid cases and the not so solid case (although the frivolous are in some jeopardy as the Courts begin to tire of them); and that litigants remain free to pursue legitimate (or even not so legitimate) claims without fear of being sued for having brought the suit. Probably this was, in the early history of pleadings (and the pitfalls contained therein) a reasonable concept.

However, in modern times, the Rules of Civil Procedure clearly provide a mechanism by which litigation can be commenced by way of a *Summons* to initiate the action which allows for all of the *discovery* that any litigant could ever need to determine those facts *and the absence thereof* upon which a legitimate Complaint with some arguable possibility of success (or maybe even a settlement) can be based.

Such *could* have easily been done here, had the intent and purpose of the defamatory Complaint been anything different than alleged by Appellants Kelly. Such *should* have been done (at the very least to the extent necessary to have evaded accusing Paul Kelly of forgery—a crime that was never committed, and upon which there never was and never will be even a scintilla of proof).

As such, in light of the readily available Rules of Civil Procedure of Discovery that completely eradicate the necessity of defamation, especially malicious defamation, whatever privilege as is alleged by the Appellees and whatever cases behind which they seek refuge should not protect them from

the consequences of their tortious actions; and they should have to stand prepared to respond to the present Complaint in the same manner as would be required of the rest of society.

CONCLUSION

On the basis of the foregoing, this Honorable Court is respectfully requested to grant this Petition for Allowance of Appeal.

KELLY & KELLY
LAURENCE M. KELLY
I.D. #27033
Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT
No. 278 M.D. Allocatur Docket, 1992
Petition for Allowance of Appeal from the Superior Court
PAUL A. KELLY AND PAMELA E. KELLY,
Petitioners

v.

PAUL A. OBER, CHARLES M. WATKINS, ANNA MIHELC AND PAULINE MIHELC,
Respondents

ORDER

PER CURIAM:

AND NOW, this 18th day of August, 1993, the Petition for Allowance of Appeal is denied.

TRUE AND CORRECT COPY:
Attest: 8/19/93
/s/Margarette Anderson
Clerk

APPENDIX B

J.A12014/92

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1939 Philadelphia 1991
PAUL A. KELLY and PAMELA E. KELLY, HIS WIFE,

Appellants

v.

PAUL R. OBER; CHARLES M. WATKINS
ANNA MIHELC and PAULINE MIHELC,

Appellees

Appeal From Order Entered June 7, 1991 In Court of Common Pleas, Civil Division, Susquehanna County, No. 1991—188 C.P.

BEFORE: CAVANAUGH, OLSZEWSKI and BECK, JJ.
MEMORANDUM: FILED JUN 18, 1992

Appellants Paul and Pamela Kelly, two attorneys in Susquehanna County, filed this suit in response to a complaint filed against them by appellees alleging that they committed various improprieties in a real estate transaction. Appellants deem the appellees' complaint "the most impertinent, outrageous, scandalous and defamatory complaint ever placed on the record in sparsely populated Susquehanna County." They seek compensatory and punitive damages on numerous causes of action, many of them bordering on the frivolous.[1] The trial

[1] These causes of action include defamation of character, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful use of civil proceedings, slander of title, breach of warranty and loss of consortium. We find slightly disconcerting this laundry list of claims, as appellants' counsel must know that there is simply no way that he would be able to establish the elements of many of these claims, which arise out of real estate transaction, at trial.

court dismissed the appellant's complaint, noting, *inter alia,* that an absolute privilege exists for all averments contained in pleadings which are pertinent and material to the relief sought. We agree in the main with the trial court's reasoning, and affirm on all issues addressed by the trial court save the appellants' breach of warranty issue. We also reinstate appellants' damage claims in Counts IX and XII of their Complaint.

The present action arises from a civil lawsuit filed on March 14, 1990 by Anna Mihelc and Pauline Mihelc against the appellants in the Court of Common Pleas, Susquehanna County (No. 1990-250 C.P.). The complaint alleged various improprieties in a real estate transaction between the Kellys and the eighty-year old Anna Mihelc and the seventy-two year old Pauline Mihelc. The complaint alleged fraud in the execution, fraud in the inducement, and intentional infliction of emotional distress. The complaint sought recission [sic] for failure of consideration, recission [sic] for grossly inadequate consideration, and the imposition of a constructive trust.

Appellants subsequently filed the present action against the Mihelc sisters and two attorneys of the firm representing the sisters in the first action, Paul Ober and Charles Watkins, on March 25, 1991 (hereafter "appellees").[2] The complaint alleged numerous causes of action arising out of the filing of the appellees' complaint, including defamation of character, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful use of civil proceedings, slander of title, breach of warranty, and loss of consortium. The Complaint sought both compensatory and punitive damages. On April 25, 1991, the appellees filed preliminary objections

[2] Two briefs were filed on appeal representing the position of the appellees. One was filed by Charles Watkins, Esq., and the other brief was filed by attorney's representing the appellees' insurance company.

and on May 22, 1991, oral argument was held before Seamans, J. At oral argument, the primary issues were (1) the continuing vitality of the well-settled rule that there exists absolute immunity for averments or allegations in a pleading which are relevant or material to the relief sought is applicable and (2) assuming the rule has continuing vitality, whether the rule applies in the case *sub judice*. After lengthy argument, Judge Seamans filed an Order dismissing the appellants [sic] complaint, and issued an Opinion in support of the Order. The appellants filed a timely appeal to this Court.

Our scope of review is limited in reviewing a challenge to the sustaining of a preliminary objection in the nature of a demurrer. *Mahoney v. Furches,* 503 Pa. 60, 66, 468 A.2d 458, 461 (1983); *Van Mastrigt v. Delta Tau Delta,* 393 Pa.Super. 142, 147, 573 A.2d 1128, 1130 (1990). "Our inquiry goes only to determining the legal sufficiency of appellant's complaint and we may only decide whether sufficient facts have been pleaded which would permit recovery if ultimately proven." *Van Mastrigt, supra,* at 147, 573 A.2d at 1130; *accord Gordon v. Lancaster Osteopathic Hospital Association,* 340 Pa.Super. 253, 260, 489 A.2d 1364, 1368 (1985). After concluding our review, we must be able to state with certainty that "upon the facts averred, the law will not permit recovery by the plaintiff."[3] *Berger v. Ackermann,* 293 Pa.Super. 457, 459, 439 A.2d 200, 201 (1981); *accord Van Mastrigt,* supra, at 148, 573 A.2d at 1130. In reviewing whether the plaintiff can recover, all material facts set forth in the complaint was well as all reasonable

[3] One of two briefs submitted on behalf of the appellees asserts the scope of review of this Court is whether the lower court has abused its discretion or committed an error of law. This is simply wrong, and the proper standard of review is set forth in the body of this Decision. We note that the various cases cited for their brief's proposition are not cases which deal with our review of the sustaining of a preliminary objection.

inferences deductible [sic] from them are taken as true for the purpose of review. *Mahoney v. Furches,* 503 Pa.Super. 60, 66, 68 A.2d 458, 461-2 (1983); *Clevenstein v. Rizzuto,* 439 Pa. 397, 400, 266 A.2d 623 (1970).

We turn to the issues raised on appeal. Normally, we would set forth at this point the issues the appellants raise on appeal. However, our review is significantly blinded by deficiencies in the appellants' brief which makes it difficult to ascertain exactly what issues he wishes to argue on appeal.[4] We are forced to characterize, to a certain extent, the issues before us on review. We believe a fair characterization of the issues before us on review is as follows: (1) whether public policy merits that we re-evaluate the absolute immunity given to averments or allegations contained in a judicial pleading which are relevant or material to the relief sought; (2) whether the judicial pleading privilege *supra* violates the Equal Protection and Due Process provisions of the United States and the Pennsylvania Constitution; (3) whether certain allegations or averments made by the appellees in their March 14, 1990, complaint are not pertinent and material to the relief sought and thus are not protected by the judicial pleading privilege *supra;* (4) whether the judicial pleading privilege *supra* applies to bar the appellants' causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress; (5) whether the lower court erred in ruling that an action must be terminated in the appellant's favor before a

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[4] The appellants' [sic] fail to divide the argument into as many parts as there are questions to be argued. We note that this is an express violation of R.A.P. 2119(a), 42 Pa. C.S.A., which envisions that there exist a conscious parallelism between the Statement of Questions Involved and the individual sections in the body of the brief. *See also Commonwealth v. Melvin,* 378 Pa.Super. 59, 64, 548 A.2d 275, 277 (1988), appeal den. 561 A.2d 741. We also fault the appellants for arguing in their brief different questions than they raised in the Statement of Questions Involved, a violation of Pa. R.A.P. 2116(a).

cause of action lies for the wrongful use of civil procedure; (6) whether the lower court erred in dismissing the action for slander of title; (7) whether the lower court erred in dismissing as premature a cause of action for breach of warranty; and (8) whether the lower court erred in dismissing appellants' loss of consortium actions and damage claims. We address appellants' third argument first, as it has the most merit.

The appellants assert that certain allegation or averments in the appellees' complaint are not pertinent or material to the relief or remedy sought, and therefore are not protected by absolute immunity. The appellants claim that two allegations in particular of appellees' complaint are not pertinent or material to the relief sought.[5] First, appellants note that the appellees' complaint alleges that the appellants have violated the provisions of the Older Adults Protective Services Act, 35 Pa. C.S.A. §10211 *et seq*. Appellants claim, quite correctly, that a private citizen cannot violate the provisions of that Act. The Act empowers *an agency* to, *inter alia,* receive and investigate reports of alleged abuse of older adults, and does not provide a private cause of action. Second, appellants note that the appellees' complaint alleges that appellant, Paul Kelly forged appellant Pamela Kelly's signature in the real estate transaction with the Mihelc sisters, and that forgery is the *unauthorized* use of another's signature. Appellants claim that the appellees blindlessly made this assertion without a scintilla of evidence, as the Kellys are man and wife, and no reasonable basis has been submitted to indicate that Paul Kelly did not have his wife's authorization to use her signature. Although admittedly there is some strength to the appellant's first assertion, we feel

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[5] The appellants aver, without specificity, that there are more than two allegations that are not pertinent, material, and relevant. However, appellants fail to disclose what these might be, and an independent review of appellees' Complaint shows that this contention by the appellants is baseless.

that the broad protection given to allegations or averments made in a pleading militates we find against the appellant.

Allegations or averments contained in pleadings that are pertinent and material to the relief sought in the civil suit are protected from civil liability. *Post v. Mendel,* 510 Pa. 213, 221, 507 A.2d 351, 355 (1986); *Pawlowski v. Smorto,* 403 Pa. Super. 71, 81, 36, [sic] 588 A.2d 36, 41 (1991). The existence of this privilege does not depend upon the motive, whether good, bad, or indifferent, of the defendant in making the alleged defamatory statement. *Greenberg v. Aetna Ins. Co.,* 427 Pa. 511, 515, 235 A.2d 576, 578 (1967), *cert. den. sub nom., Scarletti v. Aetna Casualty & Surety Co.,* 392 U.S. 907, 88 S.Ct. 2063, 20 L.Ed.2d 1366 (1968); *Pawlowski, supra,* at 81, 588 A.2d at 41. "[I]f questioned or challenged by the opposite party, all reasonable doubts (if any) should be resolved in favor of relevancy and pertinency and materiality." *Greenberg, supra,* at 516, 235 A.2d at 577-8, *quoting Kemper v. Fort,* 219 Pa. 85, 67 A. 991 (1907).

We find some strength to the appellants' claim that the OAPSA is not pertinent and material to the relief sought. In a narrow sense, this is correct: appellees apparently could never recover from the appellants in a private civil suit for "violation" of the OAPSA. In a broader sense, however, the OAPSA may have (tangential) relevancy, pertinency and materiality to the relief sought. The appellees in their complaint allege several causes of action arising out of alleged misconduct by the appellants in purchasing real estate from two aged sisters. The appellees do not allege as a count in their complaint a violation of the OAPSA. Rather, the appellees argue in *one averment* of six separate counts that the appellants are violating the OAPSA. The OAPSA defines "exploitation" as follows:

> [a]n act or course of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.

35 Pa. C.S.A. §10213. OAPSA also provides that an investigating agency, where it finds a report of abuse is substantiated, may recommend a course of action that includes pursuing civil remedies. 35 Pa. C.S.A. §10216(d); *see also* 6 Pa. Code §15.44(c). Although the appellants can not [sic] be found directly liable of violating the Act, we find that it could possibly be relevant, material, and pertinent to the relief sought in the case *sub judice* whether the appellants' conduct could be the subject of a founded report under OAPSA. Appellees are not asserting something extraneous to the relief sought, but are providing a lens in their complaint with which to view the alleged fraudulent conduct of the appellants to two older sisters. Resolving, as we must, all doubts in favor of relevancy, materiality and pertinency, we find that the averments in appellees' complaint alleging a violation of OAPSA are protected by the absolute immunity.

We find no merit to appellants' suggestion that the allegation of forgery is not relevant, material and pertinent to the relief sought. As the trial court declared, the allegation has a "direct bearing on the validity of the aforementioned agreement." We simply disagree with the tenor of appellants' argument that the improbability of a husband not having his wife's authorization to use her signature indicates a lack relevancy. There is a difference between whether allegations are relevant and whether those allegations are indeed true. The allegations

are relevant to whether the appellant engaged in misconduct towards the appellees; whether they are true or not is a question to be decided by the trier of fact. It is important to remind the appellants that even where allegations are made falsely and maliciously, if we find that allegations are pertinent to the relief sought, we have declared it protected by the absolute immunity afforded pleadings. We find no merit to appellant's assertion.

The next argument we address is the appellants' assertion that public policy is violated by the absolute immunity provided averments or allegations made in pleadings which are pertinent or material to the relief sought. Beginning their argument with a lengthy quote from Shakespeare's *Othello* to the effect that "[g]ood name in man and woman ... is the immediate jewel of their souls," and proceeding with homespun wit, the appellants ask us to reconsider the rule that absolute immunity is provided for the averments in a pleading which are relevant or material to the relief sought. If we cut through the questionably humorous anecdotes and the impassioned rhetoric, appellants present the following policy arguments which they feel are sufficient to make us reconsider the efficacy of the above rule:

> (1) It is unfair to exempt attorneys from a cause of action which would be otherwise actionable if a defamatory statement occurred outside a legal pleading.
>
> (2) The absolute privilege brings disrepute upon the legal profession, in that providing attorneys with a privilege other members of society do not have gives credence to the belief that attorneys create their own special privileges at the public expense.
>
> (3) The absolute privilege is a product of a kinder, gentler era of lawyering, when attorneys possessed a high

ethos in their profession and their personal honor. Persons of this bygone era could be expected to self-police their pleadings to ensure that no defamatory statements were contained therein. Attorneys today do not possess live [sic] by the same code of ethics, and we must narrow or even do away with the privilege to reflect changed circumstances.

(4) The ability to escape liability for defamatory remarks contained in a legal pleading provides incentive for persons who want to make otherwise defamatory remarks in the context of a legal pleading. The defamer can then can [sic] avoid liability for his remarks by simply notifying media outlets about the contents of the legal pleading.

The policy rationale behind the rule of law that an absolute privilege exists for averments or allegations in a legal pleading which are relevant or material to the relief or remedy sought is well-settled:

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. *The privilege is also extended to parties to afford freedom of access to the courts,* to witnesses to encourage their complete and uninhibited testimony in court, *and to counsel to enable him to best represent his client's interests. Likewise, the privilege exists because the courts have other internal sanctions against defamatory statements, such as perjury and contempt proceedings.*

Binder v. Triangle Publications, Inc., 442 Pa. 319, 275 A.2d 53, (1975) as quoted in *Pawlowski, supra,* at 80, 588 A.2d at 41 (emphasis added). Similarly, we have also declared:

> *This privilege rests on public policy, which allows all suitors ... to secure access to the tribunals of justice with whatever complaint, true or false, real or fictitious, they choose to present* ... the authorities, though differing as to when immunity is absolute, are uniform that, when alleged libelous matter is relevant and pertinent, there is no liability for uttering it. Public policy required this, even if at times the privilege of immunity for false and malicious averments in pleadings is abused. *Justice can be administered only when parties are permitted to plead freely in the courts and to aver whatever ought to be known without fear of consequences, if a material and pertinent averment should not be sustained. Wrong may at times be done to a defamed party, but it is damnum abscue injuria. The inconvenience of the individual must yield to a rule for the good of the general public.*

Greenburg, [sic] supra, at 515-61, [sic] 235 A.2d at 577. (emphasis added)

As an intermediate appellate court, we are not in the position, even if we were so inclined, to re-evaluate this long standing rule of law.[6] Precedent has not only clearly articulated this rule of law, but the rationale behind it. It is for our Supreme Court, if it so choose, [sic] to weigh the appellant's policy arguments, and if it finds them efficacious, to narrow or dispense with this rule of law. We find the lower court did not err in following precedent.

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[6] We remind appellants of another passage by the Bard, from The *Merchant of Venice*, Act III, scene 1, line 215 ff., which we think applies with much greater force to the case *sub judice*:

> Wrest once the law to your authority: To do a great right, do a little wrong. 'Twill be recorded for a precedent And many an error by the same example Will rush into the state.

The appellant next argues that the above rule of law violates the Equal Protection and Due Process provisions of the United States and Pennsylvania Constitutions. The appellants imply that they do not need to cite precedent for this proposition, as it is self-evident from the language of the aforementioned constitutional provisions that this rule of law is unconstitutional. The appellants assert "[t]here are those who thrive on making these simple issues complex, but they tax their brains unnecessarily." The appellants claim that continuing this rule of law is an obvious injustice comparable to the internment of Japanese-American citizens during World War II and the excesses of the French Revolution.

We think otherwise. We disagree that it is "self-evident" from the text of the above United States and Pennsylvania constitutional provisions that this rule of law is unconstitutional. Moreover, we will not conjecture on appellant's behalf the rationale indicating that this rule of law violates the United States or Pennsylvania Constitutions. As noted *supra,* the appellants present no case law to indicate that this long-settled rule is unconstitutional. The appellants do not argue that a person's reputation is property within the meaning of due process, nor do they suggest a standard of constitutional scrutiny for us to review this rule of law. The appellants do not make *any argument whatsoever* to enlighten this court as to *why* or *how* the United States or Pennsylvania Constitutions are violated. Accordingly, we are not persuaded by appellant's argument. We note that the United States Supreme Court has apparently ruled on the merits of this very issue long ago, and found it wanting. *See Abbott v. National Bank of Commerce,* 175 U.S. 409, 414, 20 S.Ct. 153, 155, 44 L.Ed. 217, 219 (1899) (state court ruling that the words in a pleading could not constitute an action for damages did not present any Constitutional question) Appellants have not responded to appellees'

contention that *Abbott* is binding precedent: Consequently, as *Abbott* has not been overruled or even questioned subsequently, and the appellants have not convinced us of the efficacy of their argument, we declare appellants' argument meritless. We also note that we find that the appellants' comparison of the supposed injustice of the judicial pleading privilege with the internment of Japanese-American citizens and the excesses of the French revolution as totally deficient in a sense of proportion.

Appellants next baldly assert that the aforementioned absolute immunity does not apply to their causes of action for intentional infliction of emotional distress and negligent infliction of emotional distress. We disagree. The aforementioned privilege has been purposely articulated in a broad fashion which obviously extends to these causes of action. *See, e.g., Pawlowski, supra,* at 80, 588 A.2d at 41 ("[] statements made by judges, attorney, witnesses and parties in the course of or pertinent to any judicial proceedings are absolutely privileged ..."). Although we have found no case law precisely on this point, we find no reason why allegedly defamatory remarks in a complaint would not be protected by absolute immunity, and yet emotional distress caused by the remarks in a complaint would be actionable. *Cf. Triester v. 191 Tenants Ass'n.,* 272 Pa.Super. 271, 278, 415 A.2d 698, 702 (1979). To hold otherwise would create an exception to the privilege which would dramatically undercut the efficacy of and rationale behind the privilege: to encourage parties to speak freely in their legal pleadings. We find this issue meritless.

The appellants also claim that the lower court erred in ruling that an action must be terminated in the appellants favor before an action lies for the wrongful use of civil procedure. This contention is utterly meritless. We note that the elements

of an action for wrongful use of civil proceedings, 42 Pa. C.S.A. §8351(a), are as follows:

> Elements of action.—A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claims in which the proceedings are based; and
>
> *(2) The proceedings are terminated in favor of the person against whom they are brought.* (emphasis added).

The appellants concede that this statute plainly states that a prerequisite for the cause of action is that the proceedings must be terminated in favor of the petitioner. However, the appellants believe that the statute is unconstitutional because it may take over ten years for litigation to be completed. The appellants burden our task by once again providing not even one citation to precedent for this proposition. In fact, the appellants fail to provide us with the constitutional provision(s) allegedly violated.[7] This argument is wholly inadequate, and we find it totally unpersuasive.

The Appellants next contends [sic] that the lower court erred in dismissing his action for slander of title. The appellants assert that there is "absolutely no substance" to the

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[7] We note that if appellants are challenging the statute's constitutionality under our Commonwealth's Constitution, pursuant to Pa.R.Civ.P. 235, 42 Pa. C.S.A., the appellants are required to promptly notify the Attorney General of Pennsylvania by registered mail so he can intercede on behalf of the Commonwealth. The Record does not reflect that the appellants met this requirement.

appellees' assertion that an action for slander of title is barred by the aforementioned absolute immunity, and they invite the appellees to show otherwise. Appellees direct us to *Triester v. 191 Tenants Association,* 272 Pa.Super. 271, 278, 415 A.2d 698, 702 (1979) where this Court held, the appellants' protestations notwithstanding, that the privileges available in defense of an action in pure defamation are also available in an action for slander of title. The appellees having shown otherwise, we find appellants' contention completely meritless.

The appellants next claim is that the lower court erred in dismissing the breach of warranty action as premature in that it is contingent upon the outcome of the appellees' lawsuit. Appellants' [sic] argue that although the title question could be resolved before the same jury at the same time, this does not mean that it has to be, and thus, the lower court's ruling that the action was premature was thus in error. Once again, the appellants cite no case law whatsoever to support their position. However, we are constrained to agree. "Under Pennsylvania law, counterclaims are permissive and may be set forth in a party's answer, or may be reserved and set forth in an independent action, at the time, and in the forum, of defendant's choosing." *Bender's Floor Covering Co. v. Gardner,* 387 Pa.Super. 531, 535, 564 A.2d 518, 520 (1989); *see also* Pa. R.C.P. 1031, 42 Pa. C.S.A.. Pennsylvania law indicates that the appellants are not forced to await the outcome of the appellees' lawsuit, or even join their action as a counterclaim to it. *Id.* We reverse the lower court as to this count.

The appellants' final claim of error is that the lower court erred in dismissing their loss of consortium actions and damage claims. We note that the lower court did not explain why it dismissed the appellants' actions for loss of consortium in

Counts X and XI[8] and damage claims in Counts IX and XII. We believe that the lower court correctly felt that no ruling was necessary as it dismissed all of appellant's substantive actions. An action for loss of consortium cannot lie unless there exists an *underlying tort* causing direct physical injury to one spouse that gives rise to a claim for loss of sexual attentions, society, and affections by the other spouse. *Prosser and Keeton on Torts* 930-2 (5th. ed. 1984). Damages, quite obviously, cannot lie where an action does not exist seeking recompense for an injury to a plaintiff. Appellants assert that if we reinstate any of the foregoing causes of action, we must also reinstate Counts IX-XII because the appellants could potentially establish at trial the elements of their loss of consortium actions and also their requested damages. We only partially agree with this assertion.

Since we find that the breach of warranty action can proceed, and the lower court has made no specific rulings as to the damage claims in Counts IX and XII, we agree that these counts must be reinstated, although we have strong doubts that the appellants have alleged facts that would entitle them to relief on at least one of them. The lower court, of course, will be free to evaluate whether the appellants have pled legally sufficient facts to entitle them to the damages alleged in an appropriate dispositional stage in the future. As for the loss of consortium actions in Counts X and XI, since we have affirmed the trial court's dismissal of all the underlying tort actions,[9] the

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[8] Count X of appellants' Complaint asserts an action for appellant Paul Kelly's loss of consortium arising out of the allegedly defamatory remarks. Count XI of appellants' Complaint asserts an action for appellant Pamela Kelly's loss of consortium arising out of the allegedly defamatory remarks.

[9] Breach of warranty, quite obviously, is not a tort action.

actions for loss of consortium are no longer tenable and we affirm their dismissal.[10]

Affirmed in part, and reversed in part.

Jurisdiction relinquished.

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[10] We also note that the loss of consortium actions in appellants' Complaint aver that the alleged injuries are derived from the allegedly defamatory remarks in the appellees' judicial pleading. Accordingly, as indicated by our rulings and reasoning *supra*, it would make no sense whatsoever for us to allow loss of consortium actions based on the same allegedly defamatory remarks protected by the judicial pleading privilege.

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1939 Phioladelphia 1991
PAUL A. KELLY and PAMELA E. KELLY, HIS WIFE,

Appellants

v.

PAUL R. OBER; CHARLES M. WATKINS
ANNA MIHELC and PAULINE MIHELC,

Appellees

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Susquehanna County be, and the same is hereby AFFIRMED IN PART AND REVERSED IN PART.

JURISDICTION RELINQUISHED.

BY THE COURT:
/s/Illegible
Prothonotary

Dated: June 18, 1992

APPENDIX C

IN THE COURT OF COMMON PLEAS
SUSQUEHANNA COUNTY, PENNA.

CIVIL ACTION—LAW

NO. 1991—188 C.P.

PAUL A. KELLY and PAMELA E. KELLY, his wife,

VS

PAUL R. OBER, CHARLES M. WATKINS, ANNA MIHELC, and PAULINE MIHELC

Laurence Kelly, Attorney for Plaintiff

Paul Ober, Attorney for Defendants

OPINION

Seamans, P.J.

Plaintiffs have sued defendants for defamation of character, intentional infliction of emotional distress, negligent infliction of emotional distress, wrongful use of civil proceedings, slander of title, breach of warranty, losses, damages and injuries, loss of consortium and punitive damages.

Plaintiffs allege that defendants have published a complaint which makes "false and defamatory" allegations against them. On this single allegation hang *all* of the aforementioned predicates of liability save wrongful use of civil proceedings and breach of warranty.

Plaintiffs concede defendants' contention that it is the law of Pennsylvania that "[a]ll charges, all allegations and averments contained in regular pleadings addressed to and filed in a Court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally suffi-

cient to obtain it or not, are absolutely privileged." *Greenberg v. Aetna Insurance Company*, 427 Pa. 511, 515, 235 A.2d 576, 578 (1967), *citing Kemper v. Fort*, 219 Pa. 85, 93, 67 A. 991, 994 (1907). *Greenberg* adds that "if questioned or challenged by the opposite party, all reasonable doubts (if any) should be resolved in favor or relevancy and pertinency and materiality." 427 Pa. at 514-15, 235 A.2d at 577-78.

Plaintiffs argue that the absolute privilege established by our highest court, with respect to the non-actionably of statements made in pleadings, is a violation of United States constitutional law. The United States Supreme Court has held that dismissal on grounds of privilege, of a suit for libel based on statements contained in pleadings "did not deprive the plaintiff of any right, privilege or immunity secured by the Constitution...." *Abbott v. National Bank of Commerce*, 175 U.S. 409, 414 (1899).

We have studied the allegedly defamatory complaint and conclude that the allegations and averments contained therein are pertinent and material to the redress and relief sought. In particular, that includes the averment that defendants acted in violation of the Older Adults Protective Services Act and the averment that defendant Paul A. Kelly forged the signature of defendant Pamela E. Kelly on an agreement which allows Anna Mihelc and Pauline Mihelc to continue to reside on property they sold to the Kellys.

Section 10213 of the Older Adult Protective Services Act, Act of Nov. 6, 1987, 35 P.S. Section 10211 *et seq.* defines "Exploitation" as

> [a]n act or cause of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or

threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.

Although the aforementioned statute does not purport to punish exploitation, it does, by the use of the term "perpetrator" seek to reprove exploitation. Resolving any reasonable doubt in favor of relevancy and pertinency, we hold the averment to be pertinent and material to the redress and relief sought.

Similarly, the allegation of forgery is pertinent and material in that it has direct bearing on the validity of the aforementioned agreement.

Accordingly, defendants' preliminary objection as to the absolute privilege accorded to pleadings is sustained and all counts in violation of the privilege must be and are dismissed.

With respect to the count sounding in wrongful use of civil proceedings, we agree with defendants that plaintiffs have no cause of action unless and until No. 1990-250 C.P. is concluded in plaintiffs' favor. 42 Pa. C.S.A. §8351(a)(2).

Finally, with regard to the breach of warranty count, we agree with defendants that plaintiffs' claim is premature in that it is contingent upon the outcome of a prior lawsuit.

IN THE COURT OF COMMON PLEAS
SUSQUEHANNA COUNTY, PENNA.

CIVIL ACTION—LAW

NO. 1991—188 C.P.

PAUL A. KELLY and PAMELA E. KELLY, his wife

VS

PAUL R. OBER, CHARLES M. WATKINS, ANNA MIHELC, and PAULINE MIHELC

ORDER

NOW TO WIT, this 7th day of June, 1991, for reasons more fully set forth in an opinion filed of even date,

IT IS ORDERED that defendants' preliminary objections be and the same are hereby sustained and that the complaint in the above-captioned civil action be and the same is hereby dismissed,

BY THE COURT,
/s/Kenneth W. Seamans
P.J.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below.

SERVICE BY FIRST CLASS MAIL
POSTAGE PREPAID
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